Supreme Court, U.S.
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No. 04-175

IN THE
Supreme Court of the United States

JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM

Petitioner,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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In the Supreme Court of the United States

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PETITIONER'S REPLY MEMORANDUM

In opposing the Petition, Respondents ("the State") ignore the repeated pronouncements of the court below that the conflict between the circuits on the application of Section 2 of the Voting Rights Act ("VRA") to a state felon-disenfranchisement law "is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court." Pet. App. 1a-2a; *see also id.* at 49a ("[A]ll three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court."); App., *infra*, 3a, 4a (Cabranes, J., concurring from denial of rehearing *in banc*). The unanimous recommendation of the court of appeals should not be so lightly disregarded.

The conflict between the Second Circuit and the other circuits derives in part from the apparent belief of the court below that the "plain statement" or "clear statement" rule trumped the unambiguous text of Section 2 of the VRA. Only by resorting to the plain statement rule was the court able to arrive at its conclusion that the VRA "does not apply" to New York's felon-disenfranchisement statute. Pet. App.

22a; *see also id.* at 48a. As it did below, the State declines to engage Petitioner's argument that this misconception of the plain statement rule directly conflicts with this Court's precedents. Instead, the State tries to minimize this conflict as a mere "misappl[ication] of a well-settled rule of law." Brief in Opp. at 11. In reality, the scope of the plain statement rule in the area of voting rights is anything but "well-settled," and the Second Circuit's misguided application of this rule to an admittedly unambiguous statute is irreconcilable with this Court's recent decisions.

With regard to the ultimate issue in this Petition – whether a state's felon-disenfranchisement law can be challenged under Section 2 of the VRA – the State's reasons for denying review are likewise unpersuasive. The State argues that because New York's law only disenfranchises felons currently in prison or on parole, this case is distinguishable from the parallel cases challenging state felon-disenfranchisement laws under the VRA pending in other courts of appeals. However debatable from a social or legal policy standpoint, the difference between state laws that disenfranchise felons permanently (and in the case of life sentences, all such laws disenfranchise permanently) and those that do not always do so is irrelevant for the purposes of determining the application of the VRA. The distinction the State urges was not recognized by the court below, nor has any court addressing this issue distinguished between incarcerated and non-incarcerated felons in determining the applicability of the VRA to felon-disenfranchisement laws. *See Johnson v. Governor of Fla.*, 353 F.3d 1287, 1318 (11th Cir. 2003), *reh'g en banc granted, opinion vacated*, 377 F.3d 1163 (2004); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *reh'g and reh'g en banc denied*, 359 F.3d 1116 (2004) (Kozinski, J., dissenting, joined by O'Scannlain, Kleinfeld, Tallman, Bybee, Callahan, and Bea, JJ.), *petition for cert. filed*, -- U.S. -- (May 24, 2004); *Baker v. Pataki*, 85

F.3d 919 (2d Cir. 1996) (*in banc*); *see also Howard v. Gilmore*, 205 F.3d 1333, 2000 WL 203984 (4th Cir. Feb. 23, 2000); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

ARGUMENT

I. The Court Of Appeals' Interpretation Of The Plain Statement Rule Cannot Be Reconciled With This Court's Precedents.

The State mischaracterizes Petitioner's argument as a request "to revisit the principles of the plain statement rule set forth in *Gregory v. Ashcroft*," Brief in Opp. at 3, and attempts to deflect Petitioner's arguments by asserting that "at most . . . the court misapplied a well-settled rule of law." *Id.* at 11.

First, Petitioner does not ask this Court to revisit the plain statement rule; rather, he asks the Court to reverse the holding of the court of appeals because it directly conflicts with relevant decisions of this Court. *Compare* decision below, Pet. App. 45a-46a n.22, 47a (acknowledging that Section 2 of the VRA is unambiguous and that "on its face" it covers felon-disenfranchisement laws, but applying plain statement rule to avoid this result), *with Penn. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 208-11 (1998); *Salinas v. United States*, 522 U.S. 52, 60 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 57 n.9 (1996); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 206 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (all instructing that the plain statement rule cannot be applied to unambiguous statutes to depart from such statutes' terms).

Second, to demonstrate that the scope and application of the plain statement rule is not "well-settled," one need look no further than the fractured decisions of the courts of appeals struggling with the same question presented here.

See Johnson, 353 F.3d at 1318 (Kravitch, J., dissenting) (arguing that felon-disenfranchisement laws should not be subject to the VRA absent a "clear statement" from Congress); *Baker*, 85 F.3d 919 (ten judges sitting *in banc* split 5-5 on whether the plain statement rule can be employed to exempt felon-disenfranchisement laws from review under Section 2 of the VRA); *see also Farrakhan*, 359 F.3d at 1117-27 (Kozinski, J., dissenting from rehearing *en banc*, arguing that "the VRA was never intended to reach felon disenfranchisement laws").

The Second Circuit's misinterpretation and misapplication of the plain statement rule not only was dispositive to deciding the ultimate question presented in this case, it has independent and potentially far-reaching significance to the power of judges to unilaterally disregard the unambiguous meaning of a federal statute if the meaning offends their individual notions of what the federal-state balance of power ought to be. The conflict between the Second Circuit's articulation of the plain statement rule and the decisions of this Court is a compelling reason to grant this Petition. *See, e.g.*, *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (certiorari granted "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents"); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted "[b]ecause this ruling appeared to be in conflict with our precedents"); *see also Elder v. Holloway*, 510 U.S. 510, 515 (1994). *See generally* Sup. Ct. R. 10(c).

II. Whether A Racially Discriminatory Felon-Disenfranchisement Statute Can Be Challenged Under The Voting Rights Act Presents A Conflict Among And Within The Circuits That Is Ripe For This Court's Consideration.

The State seizes upon a single sentence in the opinion of one of the judges of the Second Circuit (concurring in denial of rehearing *in banc*) to argue that there is no conflict between the holding of the court below and other circuits because New York's felon-disenfranchisement law affects only incarcerated felons. *See* Brief in Opp. at 3, 8-10. In doing so, the State ignores the same judge's statement – in the same opinion – that "[t]his case presents major questions of constitutional law and statutory interpretation which are now the subject of different holdings in several circuits." App., *infra*, 3a.

For the purposes of applying Section 2 of the VRA, no significant distinction can be based upon whether a state's felon-disenfranchisement law applies only to felons who are incarcerated and, as the State admits, the court of appeals drew no such distinction in its opinion. *See* Brief in Opp. at 9 n.5. Nevertheless, the State rests its argument against a grant of certiorari on the premise that because New York's law applies only to incarcerated felons, it is primarily "a penological tool rather than a pure regulation of voting," *id.* at 8, and therefore should be given greater deference than laws that disenfranchise "ex-felons" as well.[1]

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[1] To the extent the State also relies on Section 2 of the Fourteenth Amendment to defend the court of appeals' decision, *see* Brief in Opp. at 8, the State has not responded to Petitioner's argument that Section 2 of that amendment should not affect Congress's power to enact the VRA, which was primarily designed to enforce the Fifteenth Amendment. *See, e.g.*, Gabriel L. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 Geo. L.J. 259 (2004).

This argument fails for the simple reason that, as the Second Circuit has already held, New York's felon-disenfranchisement law is not a punitive measure, but instead is a "'nonpenal exercise of the power to regulate the franchise.'" *Green v. Bd. of Elections*, 380 F.2d 445, 449 (2d Cir. 1967) (quoting *Trop v. Dulles*, 356 U.S. 86, 97 (1958)). The State strains mightily to distinguish *Green*, which dealt with an earlier version of New York's Election Law that disenfranchised felons while incarcerated and after their sentences had been served. *See* Brief in Opp. at 9. It is difficult to understand, however, how amending New York's felon-disenfranchisement law to apply less harshly transforms a "nonpenal" statute into a "punitive device." *Id.* at 8. In *Trop*, this Court also recognized that felon-disenfranchisement laws are not punitive but rather are "to designate a reasonable ground of eligibility for voting." 356 U.S. at 96-97; *see also Green*, 380 F.2d at 449 (In *Trop*, "the Chief Justice used statutes depriving felons of voting rights to illustrate what is not a penal law."); *Hayes v. Williams*, 341 F. Supp. 182, 189 (S.D. Tex. 1972) (holding that Texas's felon-disenfranchisement law is not punitive, citing *Trop* and *Green*); *Kronlund v. Honstein*, 327 F. Supp. 71, 74 (N.D. Ga. 1971) (same with respect to Georgia's felon-disenfranchisement law). To the extent the court below relied upon the punitive nature of New York's felon-disenfranchisement law at all, such reliance was misplaced, and provides no meaningful distinction from the decisions of other circuits on the applicability of the VRA to such laws.[2]

Finally, although the State does not dispute that the question presented in this case is cert-worthy, it argues that because the Eleventh Circuit has granted *en banc* review in *Johnson* and because the Second Circuit might review this

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[2] The court of appeals' opinion makes only casual reference to possible punitive or penological justifications for New York's felon-disenfranchisement law. *See* Pet. App. 3a, 34a, 36a.

case *en banc* if this Petition is denied, the questions presented are not ripe for this Court's review. *See, e.g.*, Brief in Opp. at 3, 11. Although such an argument against granting certiorari can always be made – at least until every circuit has reviewed the issue and *en banc* proceedings are complete – there is little to be gained from further lower court consideration here. This is a pure issue of law that neither requires nor benefits from a factual record. The issue was the subject of a lengthy opinion in the court below, three thorough opinions in *Baker*, and substantial dissents in both *Johnson* and *Farrakhan*. The *en banc* proceedings in the Second Circuit, the Ninth Circuit, and the Eleventh Circuit are better evidence of lower courts' continuing division on this important issue, rather than evidence that this issue would benefit from further percolation. As the court below repeatedly recognized, this issue will not be resolved in the Second Circuit or in the Eleventh Circuit; definitive guidance from this Court is required. App., *infra*, 4a (Cabranes, J., concurring from denial of rehearing *in banc*) ("[I]t seems clear that the Supreme Court's definitive, nationwide resolution of the questions presented by these cases is appropriate."); *see also* Pet. App. 1a-2a, 49a.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the principal brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 21, 2004.

APPENDIX

SECOND SUPPLEMENTAL APPENDIX

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Order of the United States Court of Appeals
for the Second Circuit *sua sponte* denying rehearing
in banc, with concurring and dissenting opinions
(October 1, 2004) 1a

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of October two thousand and four,

JALIL ABDUL MUNTAQIM,
a/k/a Anthony Bottom,

Plaintiff-Appellant,

v.

PHILLIP COOMBE; ANTHONY ANNUCCI; LOUIS F. MANN,

Defendant-Appellee.

At the request of a judge, the court *sua sponte* conducted a poll as to whether to rehear this case *in banc*. The suggestion did not garner support from a majority of the active judges on the court, and has therefore failed.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/
Richard Alcantara, Deputy Clerk

José A. Cabranes, *Circuit Judge*, concurring:

The question presented in this case should not be confused with the more frequently debated question whether *former* felons should lose their right to vote for a time or even permanently. The issue presented here is whether New York Election Law § 5-106– which disenfranchises persons *currently in prison or on parole*–can be challenged under the Voting Rights Act. This presents a significantly narrower legal and policy issue. *See Developments in the Law: One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942-43 (2002) (noting that two states grant prisoners the franchise; sixteen states disenfranchise felons during the incarceration period only; four states, including New York and Connecticut, disenfranchise those incarcerated or on parole, but not those on probation; and twenty-eight states disenfranchise those incarcerated, on parole, or on probation, of which eight permanently disenfranchise those convicted of felonies).

I note also that the New York law here in question dates to 1829 in its original form, more than thirty years before the Civil War. *See* 1 N.Y. Rev. Stat. ch. 6, tit. 1, § 3 (1829) ("No person who shall have been convicted within this state, of an infamous crime, at any time previous to an election, shall be permitted to vote thereat; unless he shall have been pardoned by the executive, and by the terms of such pardon restored to all the rights of a citizen."); *see also* N.Y. Const. Art. 2, § 2 (1829) ("Laws may be passed, excluding from the right of suffrage, persons who have been, or may be, convicted of infamous crimes."). There is no claim in this action that the statute was enacted with any racially discriminatory intent, but rather that the statute "violates the Voting Rights Act because it has 'resulted in the unlawful dilution of voting rolls in the African-American and Hispanic communities of New York City' and because the racial disparity in New York's prison population is caused, at

least in part, by racial discrimination in sentencing." *Muntaqim v. Coombe*, 366 F.3d 102, 105 (2d Cir. 2004) (quoting Compl. ¶ 18).

As the author of the panel opinion which has been the subject of the *en banc* poll, I offer a bit of history. No party has sought *en banc* review in this case; rather, the litigants chose to petition directly for a writ of certiorari in the Supreme Court. They do so with good reason. This case presents major questions of constitutional law and statutory interpretation which are now the subject of different holdings in several circuits. The panel opinion specifically stated that "all three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court." *Id.* at 130. No judge of this Circuit has expressed any view suggesting otherwise.

As noted in our panel opinion, a panel of the Ninth Circuit has held that a claim of vote denial under Washington State's felon disenfranchisement scheme can state a claim under § 1973.[1] *Farrakhan v. Washington*, 338 F.3d 1009, 1012 (9th Cir. 2003) (involving disenfranchisement scheme whereby "disenfranchised felons in Washington remain ineligible to vote until they have completed all the requirements of their sentences and have obtained certificates of discharge" from the sentencing court).[2] In *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), a panel of the Eleventh Circuit, over a

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[1] Judge Richard A. Paez's opinion was joined by U.S. Circuit Judge Dorothy W. Nelson, and U.S. Circuit Judge Harlington Wood, Jr., of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

[2] The Ninth Circuit denied a petition for rehearing *in banc* over the dissent of seven judges. *See Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004).

dissent by Judge Phyllis A. Kravitch, assumed, though it did not expressly hold, that § 1973 applies to felon disenfranchisement schemes.[3] *Id.* at 1292-93, 1306 (involving disenfranchisement scheme whereby first-time convicted felons are permanently disenfranchised unless they receive clemency). This judgment was recently vacated when the Eleventh Circuit decided to rehear the case *en banc*. *Johnson v. Governor of Florida*, 377 F.3d 1163 (11th Cir. July 20, 2004).

Petitions for certiorari are currently pending before the Supreme Court in this case as well as in *Farrakhan*. *See Muntaqim v. Coombe*, petition for cert. filed, 2004 WL 1752185, (U.S. July 21, 2004) (No. 04-175); *Locke v. Farrakhan*, petition for cert. filed, 2004 WL 1203077, (U.S. May 24, 2004) (No. 03-1957).

In these circumstances, it seems clear that the Supreme Court's definitive, nationwide resolution of the questions presented by these cases is appropriate.

Straub, Pooler, Sack and Katzmann, *Circuit Judges*, concurring:

While we recognize that the suggestion to rehear this case *in banc* has failed, our concurrence is specifically without prejudice to renewal by a judge or party after the Supreme Court acts on the *certiorari* petitions now pending.

Dennis Jacobs, *Circuit Judge*, dissenting:

I have no qualm about the panel's scholarly opinion; but I vote in favor of the poll nevertheless, because a majority now expresses– or signals– an interest in hearing this appeal

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[3] Judge Rosemary Barkett's majority opinion was joined by U.S. District Judge John P. Fullam, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

in banc. Unless our *in banc* practice is to become a dead letter altogether, this is a circumstance in which our full Court should convene. It is no proper solution for us to forgo *in banc* review "without prejudice," and thus expressly reserve an opportunity to hear the case as a full court if the Supreme Court does not: the Court of last resort is on First Street, not on Foley Square.

Calabresi, Sotomayor, and B.D. Parker, *Circuit Judges*, dissenting:

We respectfully dissent from the court's denial to rehear this appeal *in banc*.